



**Golo v Republic (Criminal Appeal E010 of 2025)  
[2025] KEHC 14454 (KLR) (14 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 14454 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL APPEAL E010 OF 2025**

**FR OLEL, J**

**OCTOBER 14, 2025**

**BETWEEN**

**WARIO GOLO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original Conviction and sentence of the Hon S.K. Arome, Principal Magistrate, delivered on 18.03.2025 in Marsabit MCCR No E063 of 2024)*

**JUDGMENT**

**A. Introduction**

1. The Appellant, Wario Golo charged with two (2) counts before the court. On count one, he was charged with the offence of being in possession of a firearm without holding a firearm certificate, contrary to section 4 (1), (2),(a) as read with Section 3(a) of the *Firearms Act*, Cap 114 Laws of Kenya. The particulars were that on the 2<sup>nd</sup> day of May, 2024, at around 1240 hours at Kubi Bagasa in Dirib Gombe location, within Marsabit County, without reasonable excuse, he was found in possession of a firearm, make Simonov Carbina, serial number 3r 4149, without holding a firearm certificate.
2. On count two, the Appellant was charged with the offence of being in possession of ammunition without holding a firearm certificate contrary to section 4 (1),(2)(a) as read with Section 3(a) of the *Firearms Act*, Cap 114 Laws of Kenya. The particulars were that on the 2<sup>nd</sup> day of May, 2024, at around 1240 hours at Kubi Bagasa in Dirib Gombe location, within Marsabit County, without reasonable excuse, you were found in possession of 13 (thirteen) rounds of ammunition of caliber 7.62 x 39mm without holding a firearm certificate.



## B. Facts At Trial

3. PW1 PC Henry Wafula of DCI Marsabit Central recalled that on 02.05.2024, they got information that there was a suspect who had a firearm at Kubi Bagasa Mayatta, and proceeded to the scene, accompanied by CIP Patrick Gitonga, Cpl Leperes, Cpl Malimali, Pc Moses Loliwo, and Pc Isaack Baricha. When they reached the home of Nuno Amina, they saw a person running away, while carrying a firearm, facing down. He ran after him and ordered him to surrender, while aiming his gun at the said suspect, who surrendered and lifted his arms, while holding onto the said firearm.
4. They arrested the suspect, proceeded to disarm him, and took hold of the firearm, which was a carbine No 3r 4149, that had three rounds of ammunition in the magazine and one ammunition in the chamber, which means the holder of the gun was ready to shoot. He further searched the suspect and, on his waist, found a red and black belt which had two pouches attached thereto.
5. Upon further search, they discovered that the red pouch contained 9 ammunition of 7.62mm x 39mm. Cpl Fred Leperes prepared the inventory, and they escorted the suspect, whom he identified as the accused person, to Marsabit police station. Under cross-examination, he confirmed that he was the one who arrested the accused person in the presence of other police officers.
6. PW2 CIP Kenneth Chomba testified that he worked at DCI headquarters, ballistic department, and had been trained at the Weapon Technical Intelligence Center at Human Peace Support School in Embakasi, and received further training in incident reconstruction in the USA. He was a colleague of and had trained IP Francis Karori, and worked together for five years. He was thus familiar with his handwriting, making him competent to present his report.
7. On 09.05.2024, Cpl Fred Leperes brought one Simonov carbine rifle, serial No 3r 4149 ( marked A1), and 13 rounds of ammunition ( marked B1 to B13) to the ballistic laboratory and wanted them to ascertain if the rifle and ammunition were a firearm/ammunition under the *Firearms Act* and whether the same were capable of being fired. They were also to investigate if the rifle had been used to commit any other offence within the Republic of Kenya.
8. On 15.05.2024, the said items were examined by his colleague, IP Karori, and he did ascertain that Exhibit A was a Russian-made Simonov carbine rifle in caliber 7.62mm, which was in good general and mechanical condition. It was successfully test-fired using three rounds of ammunition selected randomly and was capable of firing rounds of ammunition in caliber 7.62mm x 39mm. IP Karori had further done a comparative microscopic examination of the test-fired cartridges and established that the gun had not been used for any recorded criminal activity.
9. From the examination carried out, IP Karori formed an opinion that the Exhibit A1 and B (1-13) were capable of being fired and were a firearm and ammunition, respectively, as defined under the *Firearms Act*, Cap 114, laws of Kenya. PW2 produced the said ballistic report as an exhibit before the court. Under cross-examination, he confirmed that from their records, the said firearm had not been connected to any crime committed within Kenya.
10. PW3 Cpl Fred Leperes testified that he was attached to Marsabit DCI office and was part of the team of DCI officers who had arrested the appellant, having received information that he was in possession of an illegal firearm. When they reached the homestead at Kubi bagasa, they saw the appellant running away while carrying a rifle and gave chase, while ordering him to surrender. PW1 eventually caught up with him and arrested him. They recovered one Simonov rifle serial No 3r 4149, loaded with 4 rounds of ammunition 7.62mm x 39mm. On his waist, the appellant was carrying two pouches on his belt, and therein, they further recovered 9 rounds of ammunition.



11. He did an inventory of the recovered items, and the same was explained to the appellant in Boran language by PC Baricha, after which the appellant affixed his thumbprint on the inventory form. They thereafter escorted the appellant to Marsabit Police station and eventually had him charged with the offence before the court. PW3 produced the rifle, ammunition, and inventory as Exhibits before the court. Under cross-examination, PW3 reiterated his earlier evidence and confirmed that they did not take any photographs at the scene.
12. PW4 PC Adan Baricha also confirmed that he was attached to Marsabit DCI office and was amongst the police officers who went and arrested the accused person. Upon arrest, he also explained to the appellant the contents of the inventory in Borana language and produced the interpreter's certificate as an exhibit before the court.

### **C. Defence Case**

13. The appellant gave sworn evidence and stated that he was a livestock herder and was arrested because he had collected a firearm from a bush and showed it to members of the public, who in turn called the police, who came and arrested him. Under cross-examination, he confirmed that he was arrested at a cow shed and had not reported to the police that he had found a firearm. He also confirmed that he did not have a license to carry the said firearm
14. The trial court considered the evidence adduced by both parties, and convicted the Appellant on all charges levelled against him. Upon mitigation, he was sentenced to serve a term of five years on count one, and, while on count two, he was sentenced to serve two years' imprisonment. The said sentences were to run concurrently.

### **D. The Appeal**

15. Being wholly dissatisfied by the said judgment and sentence, the Appellant filed his petition of Appeal and raised the following grounds of Appeal;
  - a. The learned Trial Magistrate erred in matters of law and fact by failing to take into account the appellant's defence.
  - b. The learned Trial Magistrate erred in matters of law and fact in holding that the prosecution had proved its case beyond reasonable doubt, when in fact they had not.
  - c. The learned trial magistrate erred in law and fact in failing to independently analyze and/or evaluate the evidence on record, hence an erroneous determination.
  - d. That the learned trial magistrate erred in law and fact in failing to appreciate and find that all the charges preferred against the appellant had not been established and proved as required by law.
  - e. That the learned trial magistrate erred in law and fact in failing to consider the appellant's defence, which was not at all displaced by the prosecution side as provided by law under section 212 as read together with section 309 of the Criminal Procedure Code, Cap 75 Laws of Kenya, and thus was prejudiced.
  - f. That the learned trial Magistrate erred in law and fact in convicting and sentencing the appellant without any pre-sentence and social inquiry report.
  - g. That the learned trial magistrate erred in law and fact in imposing a very harsh and excessive sentence without considering the appellant's mitigation, and the circumstances of the case.



- h. That the learned trial Magistrate erred in law and fact in failing to consider the time spent in remand before melting his sentence.
16. The Appellant thus sought to have his conviction and sentence quashed and he be set free forthwith.
17. This being the first appeal, this court is expected to re-evaluate the evidence tendered before the trial court and to come up with its own logical conclusion by taking into account the fact that it did not have the advantage of seeing and hearing the witnesses and their evidence and/or see their demeanour. This court relies on the finding of the Court of Appeal in *Kiilu & Another V Republic*, [2005] 1 KLR 174, where they stated thus:
- “An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate court’s own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions.
- It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusions; only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses”.
18. I have considered the entire record of Appeal, the trial bundle record, and the submissions on record filed by the parties. I find that the issues for determination are as follows;
- a. Whether the Appellant was found in actual possession of the firearm and ammunition.
  - b. Whether the sentence passed was harsh.

**Issue 1: Whether the Appellant was found in actual possession of the firearm.**

19. Section 4 of the Penal Code, which is the interpretation section, defines “possession” as follows;
- (3) “Possession”
- (4),(a) “be in possession of” or “have in possession” includes not only having in one’s own personal possession but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belongs to or occupies by oneself or not) for the use or benefit of oneself or any other person;
- (5),(a) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them;
20. The Black’s Law Dictionary, 10<sup>th</sup> Edition, defines the term “possession” to mean –
- The fact of having or holding property in one’s power, the exercise of dominion over property. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of the claim to the exclusive use of a material object. Something that a person owns or controls.”
21. The definition of possession connotes two elements –
1. being in physical control of the items of the offence and or in joint control with another.



- (2) knowledge or intention of having the article, instruments, thing or items constituting the offence.
22. In the case of *Jean Wanjala Songoi & Patrick Manyola v Republic* (2014)eKLR, the court expounded the same as follows:
- “...Possession would involve an element of control of the thing a person is said to have. It is, in effect, the act of having and controlling property. The right under which a person can exercise control over something to the exclusion of all others. In this case, the aspect of the offence was not established beyond reasonable doubt against the appellants.”
23. In *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR, the Court of Appeal, in constructing the provisions of Section 4 of the Penal Code, held that the section encompasses both actual and constructive possession. The Court held that:
- “In our view, under that provision, having the RDX does not require the appellants to be in actual, personal physical possession of it. So long as there is evidence on record that they knowingly had the RDX at the golf course for their own use or that of any other person, that will constitute possession within the meaning of the Penal Code. Indeed in *Martin Oduor Lengo & 2 Others v. Republic* [2014] eKLR and *Chrispine Kent Otieno v. Republic* [2017] eKLR, this Court affirmed that possession under section 4 of the Penal Code encompasses both actual and constructive possession.”
24. PW2 Chief Inspector Kenneth Chomba confirmed that his colleague Inspector Francis Karori undertook forensic examination of the recovered Simonov carbine rifle Serial No 3r 4149, and the 13 ammunition in caliber 7.62mm x 39mm, and formed the opinion that both were both were capable of being fired and were a firearm and ammunition respectively as defined under the Firearm Act, Cap 114.
25. PW1, PW3, and PW4 were part of the team that arrested the appellant, and he was found in physical possession of the rifle and ammunition. In defence, too, the appellant admitted that he was in possession of the said firearm, without being licensed, but defended himself on the basis that he had picked up the said firearm from the bush while herding livestock and had intended to take it to the police station. Possession was therefore convincingly proved, and I do find and hold that the appellant's conviction was proper and safe.

## **Issue 2: Whether the sentence passed was harsh**

26. The Court of Appeal in the case of *Benard Kimani Gacheru v Republic* (2002) eKLR stated;
- “It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matters stated i.e. shown to exist.
27. Section 4(3),(a) of the *Firearms Act*, Cap 114 Laws of Kenya, provides for a sentence of not less than 7 years and not more than 15 years imprisonment for the 2 counts. The appellant was sentenced to serve



5 years on count one and 2 years imprisonment on count two. Both sentences were to run concurrently. The sentence passed was not manifestly high/excessive in the circumstances of the case. The only error noted is that the trial court failed to consider the period the appellant spent in remand and to give him benefit of the same under Section 333(2) of the Criminal Procedure Code.

#### **E. Disposition**

28. The upshot is that the appellants' appeal against his conviction fails and is dismissed.
29. The sentence passed by the trial court, too, is upheld, but shall run from 02.05.2024, when the appellant was arrested
30. Right of Appeal 14 days.

**JUDGMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MARSABIT THIS 14<sup>TH</sup> DAY OF OCTOBER 2025.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 14<sup>th</sup> day of OCTOBER,2025.

In the presence of: -

Present in Court .....Appellant

Mr. Kilinyet .....For O.D.P.P

Mr. Jarso .....Court Assistant

